

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 1186 of 1993****For Approval and Signature:****HONOURABLE MR.JUSTICE A.L.DAVE****HONOURABLE MR.JUSTICE BANKIM.N.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to
see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the
judgment ?

4 Whether this case involves a substantial question of law
as to the interpretation of the constitution of India, 1950
or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ANOPSINH GULABSINH RATHOD - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR KB ANANDJIWALA for the Appellant.

MR HM PRACHCHHAK, APP, for the State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**and****HONOURABLE MR.JUSTICE
BANKIM.N.MEHTA****Date : 15/06/2006**

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be tried by learned Sessions Judge, Panchmahals, at Godhra, for the offence of murder of one Arvindbhai Chhaganbhai, allegedly committed by the appellant during the night falling between 21st and 22nd March, 1990, by strangulating the deceased, at village Rampur-Kasanpur in Godhra Taluka of Panchmahals District. The Sessions Court accepted the prosecution case and convicted the appellant for the offence of murder and sentenced him to undergo imprisonment for life and to pay a fine of Rs.500/-, in default, to undergo rigorous imprisonment for a further period of two months, by judgment and order dated 20th October, 1993 in Sessions Case No.137 of 1990.

2. The prosecution case against the appellant was that the appellant was in love with one Babuben, cousin of deceased-Arvind Chhagan. Because of opposition of family members of Babuben, the relationship between the appellant and Babuben was snapped and Babuben was to be married off to another match found for her

by her parents. It is the case of the prosecution that the appellant was, therefore, aggrieved and he wanted Babuben to elope with him, to which also Babuben did not agree. It is the case of the prosecution that this enraged the appellant and, therefore, he threatened Babuben as well as Kalsing, brother of the deceased, that the appellant would ensure that the marriage of Babuben would not take place and for doing that, he may even commit murder of any relative of Babuben. As per the prosecution case, dead body of Arvind was found in the morning hours of 22nd March, 1990 from a field located just behind the house of the deceased. On the previous day, in the evening, there was a family function in respect of marriage of Babuben, which the appellant had attended without invitation and there was some quarrel in that regard. Around that time, the appellant is alleged to have invited deceased-Arvind for attending the function. Arvind, who was sleeping, was called but, ultimately, he said that he would not like to attend and went home. This happened in presence of Ramesh, brother of the deceased, and one Hira Ranchhod. On the deceased going back home, the appellant also said that he would like to go and change his dress and left the company of Hira Ranchhod and

Ramesh. During the night nobody knew what had happened but Arvind did not come back and on the next day in the morning, he was found to be dead. On finding the dead body, an accidental death was registered at the behest of Chhaganbhai Mansing, father of the deceased. In that information, he expressed no suspicion on anyone. Subsequently, somehow, during the course of investigation, the above factors were revealed and, therefore, the appellant came to be arrested on 7th April, 1990. Charge sheet was filed in the Court of learned Chief Judicial Magistrate, at Godhra. But, as the case was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court and Sessions Case No.137 of 1993 came to be registered. Charge was framed against the appellant by the Sessions Court at Exhibit 2. The appellant-accused pleaded not guilty to the charge and came to be tried. The prosecution led the evidence and the Sessions Court, after considering the evidence on record, came to a conclusion that the prosecution could successfully establish the charge against the accused-appellant and recorded conviction, as stated above. Aggrieved by the said judgment and order, present appeal is preferred.

3. Learned Advocate, Mr. Anandjiwala, for the appellant and learned Additional Public Prosecutor, Mr. Prachchhak, for the State are heard. They have, during the course of arguments, taken us through the record and proceedings of the case and the judgment of the Trial Court.

4. Learned Advocate, Mr. Anandjiwala, submitted that the prosecution case was founded on circumstantial evidence and the Trial Court failed to visualize and recognize the flaws in the prosecution evidence and committed an error in recording conviction. He submitted that complete chain of circumstance is not established by the prosecution. To substantiate his contention, Mr. Anandjiwala submitted that the prosecution has not brought on record as to how and at whose instance the dead body was located. He submitted that the evidence as to motive emanating from deposition of Babuben is not reliable because whatever she has stated in her deposition is proved to be a gross improvement through the deposition of the Investigating Officer. Mr. Anandjiwala submitted that the next link of the chain that is

missing is the lack of evidence as to what led to the arrest of the appellant and when and how was he arrested. He submitted that there is no evidence to show the physical condition of the appellant when he was arrested. This is important in view of the fact that the medical evidence indicates that the deceased would have resisted when he was tried to be throttled, which may have caused injury on person of the assailant. Mr. Anandjiwala submitted that the evidence as to last seen together in the form of deposition of witness-Ramesh is not so clear. There is no evidence to show the location of the house of the accused from the place wherefrom it is alleged that the deceased-Arvind and, subsequently, the appellant departed from the company of Ramesh and others. There is no evidence as to in which direction both of them went and there is no evidence regarding the time gap between the departure of deceased-Arvind and that of the appellant. Mr. Anandjiwala also submitted that the evidence of Narvat is also shaky. The said witness stated that when he went out for buying Beedi for his father, he was told by the appellant to look for the dead body of the deceased in the field behind their house. This happened between 7.00 A.M. and 8 A.M. It has come on record that the dead

body was found at about 8.00 A.M., but there is no evidence to show that the dead body was found out on the basis of information given by Narvat. The witness, who firstly located the dead body, namely, Parsanben, has not at all been examined. Mr. Anandjiwala submitted that the prosecution has failed to examine important witnesses like Hirabhai Ranchhodbhai, Parsanben, Juvansing, Shanabhai and Champaben. The Investigating Officer, P.S.I. Menat, has not at all been examined. The conduct of Chhaganbhai, father of the deceased, is also unnatural when he says that he had noticed absence of Arvind in the house at night, but he did not make any attempt to search for him and went to sleep and started searching for him only in the next morning. Mr. Anandjiwala submitted that the Trial Court has recorded conviction by relying on evidence on Narvat, holding that the appellant made extra-judicial confession before him whereas, if the evidence of Narvat is seen, whatever is claimed to have been disclosed by the appellant before that witness cannot be considered as a confession. He, therefore, submitted that the Trial Court has failed to (i) properly appreciate the evidence, (ii) consider that the nexus between the appellant and the crime is not established, and (iii) consider that

the motive part is also not properly established and, in absence of any direct evidence, relying on such scanty evidence, conviction could not have been recorded. He, therefore, submitted that the appeal may be accepted, the judgment and order may be set aside and the appellant may be acquitted of the charges levelled against him.

5. Learned Additional Public Prosecutor, Mr. Prachchhak, on the other hand, has opposed this appeal. He submitted that a young boy aged about 11 years has been done to death. He also submitted that the evidence of Babuben as well as Kalsing (Exh.6) clearly indicates that the appellant had grievance against the marriage of Babuben with another person. Their depositions also reflect determination on the part of the appellant to thwart the marriage of Babuben by any means, including committing murder of a close relative of Babuben. Mr. Prachchhak submitted that, in the previous evening of the day on which the dead body of the deceased was found, the appellant was seen last in the company of the deceased, as per deposition of witness-Ramesh (Exh.8) and in the next morning dead body is found. Around the time when the

relatives were searching for deceased-Arvind, the appellant met Narvat and told him that they may look for Arvind in the field behind the house of Arvind himself and dead body was found from that place. All these factors collectively establish the nexus between the appellant and the evidence. Mr. Prachchhak submitted that nothing emerges from cross-examination of witnesses, Ramesh and Narvat, to show as to why they should falsely implicate the appellant. The Trial Court, has, therefore, rightly recorded conviction and this Court may not interfere with the same in exercise of appellate jurisdiction. He submitted that the appeal may be dismissed.

6. We have considered rival side contentions and have examined the record and proceedings from that perspective.

7. There is no dispute about the fact that the case against the appellant rested on circumstantial evidence. The prosecution case is accepted by the Trial Court by holding that the prosecution has established the motive, the fact that the appellant was seen last in company of the deceased and that there is extra-judicial

confession of the appellant before Narvat. The prosecution has examined as many as 12 witnesses, out of which, depositions of Kalsing Chhaganbhai (Exh.6), Babuben Dhirabhai (Exh.7), Rameshbhai Chhaganbhai (Exh.8), Narvatbhai Shanabhai (Exh.9) and Chhaganbhai Mansingbhai (Exh.10) are important.

8. Witness-Kalsing Chhagan (Exh.6) says that two days prior to the incident, he had gone to Surat. Before he left for Surat, the appellant had told him that the marriage of Babuben was thwarted by him once and the second time also, he is going to do it and, if need arises, he would commit a murder. He says that he had seen Babuben and Anopsing sitting under a neem tree near the house of Hira. He had noticed that both of them were weeping. He and Dudha Balwant went there to see, but both of them had left and, thereafter, he went to Surat, and, on having come to know about the incident, he came back. He says that he suspects the appellant of murder of his brother-Arvind. During cross-examination, he denies the suggestion that he had not stated to the police about the appellant having given a threat of committing murder and asserts that he did tell the police about the threat by

the appellant. However, if deposition of C.P.I., Jitendra Bahadursinh (Exh.26), is seen, he says that the witness did not state this aspect to him in the statement. Therefore, the deposition of this witness on motive and determination on part of the appellant to commit murder of some relative of Babuben is only an afterthought and improvement in the story.

9. If deposition of Babuben Dhirabhai (Exh.7) is seen, she says that, she had an affair with the appellant. The appellant wanted her to elope with him, which she denied and insisted that she would marry a person with whom her parents want her to marry. She says that the appellant told her that, if she does not elope with him, he would commit murder of any of her relatives. She says that then she left the appellant. She says that the appellant had tried to physically drag her and take her away and, at that time, deceased-Arvind was present. Arvind told that he would go and call his uncle. Thereafter, the witness says that she left the place. At that time, the appellant and Arvind were having a scuffle. She says that, thereafter, Anopsinh came to her house where people were playing at the tune of the drum beat. The appellant was

caught hold of by the father of the witness and manhandled. The other persons rescued the appellant. Arvind, however, did not come to play to the tune of the drum beats and was found dead in the next morning. During cross-examination, she denies the suggestion that she had stated before the police that she did not know as to why, how and who has murdered Arvind and that she has no suspicion about anyone. She also denies that she has not stated before police that the appellant had told her that he would commit murder of any of her relatives to thwart her marriage. This contradiction appears to have been proved by the defence through deposition of P.W.8-Jitendra Bahadursinh (Exh.26), who says that Babuben did not state in her statement that the appellant had told her that, if she did not elope with him, he would commit murder of someone of her family to thwart the marriage. The witness admits that she is against the appellant because the appellant had lodged a complaint against her father and uncle because of the quarrel between the appellant and her father, on that day in the evening. During cross-examination, she also admits that, in the quarrel, the appellant was beaten.

9.1 What emerges from this evidence, therefore, is that the lady had an affair with the appellant and the appellant wanted her to marry him. She, however, had succumbed to the pressure of her family and decided to marry the person whom her parents wanted her to marry with. She improves upon her story by adding that the appellant had threatened to commit murder of her family to thwart the marriage. This version is given by her only in her deposition and not in her statement before police. Thus, this witness also improves her story to implicate the appellant. She has grievance against the appellant because of complaint by him against her father. Her improved version, therefore, cannot be accepted.

9.2 The evidence regarding the appellant having scuffle with the deceased emerges from deposition of this witness loses significance for two reasons. Firstly, that, thereafter, the deceased was called from his house where he was asleep to attend the drum beat, as per deposition of P.W. Ramesh. Secondly, the conduct of this witness in going away despite seeing the scuffle is unnatural and makes her version prone to doubt.

10. Witness-Ramesh Chhagan is examined at Exh.8. He says that Arvind was his brother. On the previous evening, there was marriage of Babuben, their cousin and daughter of Dhirabhai and, therefore, there was function of drum beat. He and Hira Ranchhod went there. While they were going, the accused met them at the gate and inquired of Arvind. He told the appellant that Arvind was at home and, therefore, the appellant told them to take Arvind also with them for playing to the tune of drum beat. They, therefore, woke up Arvind and took him with them. After some time, Arvind said that he did not want to go with them and, therefore, he told Arvind to go home and take sleep. The appellant told them that he also would like to go and change his trousers. They said that they would join him, but he said no to it and, therefore, they went away and Anopsinh went back. He says that Anop came there after some time but Arvind did not come. When the appellant came to play to the tune of drum, the witness's cousin, Dhira, objected to it and there was a quarrel. He, thereafter, had gone home and went to sleep. Next day morning, he learnt that Arvind was not at home and on search, his dead body was found from the field located behind the house.

10.1 The witness is cross-examined. He says that people had noticed dead body of Arvind in the field of Lala Vankar at about 8.00 A.M. He went there. He found that many people had gathered, who included Narvat Shana. At that time, nobody knew as to who murdered Arvind.

10.2 From the evidence of this witness, attempt is made to show that the deceased was last seen together in company of the appellant. However, the evidence suffers from remarkable lacunas. The exact time as to calling and return of Arvind is not shown by the prosecution. There is no evidence worth the name to show the location of the house of the appellant from the place wherefrom he and Arvind departed from the company of witness-Ramesh and others - whether it is in the same direction of the house of Arvind or in different direction is not brought on record. There is no evidence worth the name to show that both of them left almost simultaneously. There is no evidence to show that they went in the same direction.

10.3 The absence of exact time of departure assumes greater importance in light of the medical evidence. Dr. L. V. Desai, who performed the postmortem, is examined as P.W.11, at Exhibit 23. The postmortem notes are at Exhibit 24. He says during cross-examination that death of the deceased must have occurred around 36 to 48 hours prior to postmortem. In the next breath, he also says that death may have occurred within 3 to 4 days. Now, if postmortem notes are seen, it appears that the postmortem was performed between 8.30 A.M. and 9.30 A.M. on 23rd March, 1990. The period of 36 hours taken backwardly would take us to 8.30 P.M. on 21st March, 1990. The death must have occurred, therefore, before 8.30 P.M. on 21st March, 1990 and after 8.30 A.M. on 21st March, 1990. Differently put, it may have occurred between 8.30 A.M. and 8.30 P.M. on 21st March, 1990. The exact time of what transpired before Ramesh, as he states, has, thus, assumed greater relevance, which has not been brought on record by the prosecution.

10.4 The evidence of last seen together, therefore, suffers from the defects, as stated above, namely, that there is no material

to show that the deceased and the appellant left together; that there is no material to show the time lag between departure of Arvind and the appellant; that there is no material to show that they left in same direction; and that there is no material to show that the house of the appellant and that of the deceased are located in the same direction from the place from which they departed.

11. Now comes the evidence of witness-Narvat Shanabhai (Exh.9). He says that, on the day previous to the murder of Arvind, he had gone to play to the tune of drum beat on the occasion of marriage of his cousin-Babuben and, at that time, the appellant also came there. Thereafter, the witness says that he had gone home and went to sleep. He says that he and Juvan went to Bhudar Dalsukh for buying beedi for his father. The appellant met him near the house of Ranchhod Moti and inquired whether Arvind was found and, on being replied in negative, he told them to look for Arvind in the field behind their house. The witness says that, he had gone home and told the family members and, thereafter, when they searched, they found the dead body of Arvind from the field. During cross-examination, he says that his statement was recorded

after six days because he had gone to school for studies. He also says that, it was for the first time before the police that he told about the appellant having told him to look for the dead body of Arvind in the field. Next he says that he had told his family members and others about the same.

11.1 The say of this witness that the appellant told him to look for the dead body of the deceased in the field behind the house and that, on his informing the family members, the family members searched for Arvind in the field and found his dead body is to be seen in light of deposition of Ramesh, who says that, at about 8.00 A.M. people had located the dead body of Arvind from the field. It is also worth a note that, according to the first informant, father of deceased-Arvind, the dead body was firstly noticed by his wife, Parsanben. Witness Narvat shifts his version on question as to whether he really told others on what transpired between him and the appellant because, on the one hand, he says that he told about this, for the first time, before police in the statement which was recorded after six days and, on the other hand, in the next breath, he says that he had told this to his

relatives. The person who firstly noticed the dead body, namely, Parsanben is not examined as a witness and, therefore, there is no reliable evidence to show as to how and under what circumstances the dead body was noticed. There is absence of positive evidence to show that dead body was found out on the basis of information given by this witness to the relatives.

11.2 What is alleged to have transpired between the appellant and Narvat has been considered by the Trial Court as a strong piece of evidence in the form of extra-judicial confession. In our opinion, even if the appellant had told Narvat to look for the dead body in the field behind the house, the same cannot be treated as an extra-judicial confession of guilt or involvement in the incident. The Trial Court, therefore, certainly ran into an error in treating this as an extra-judicial confession.

12. Apart from these aspects, we notice several other defects in the prosecution case. The first is that, important witnesses like Hirabhai Ranchhodbhai, Parsanben, Shanabhai, Juvansing and Champaben have not been examined. Not only that,

the Investigating Officer, P.S.I. Menat, who had recorded the statements of several witnesses, has not been examined as a witness. The prosecution has not led any evidence to show as to what led to the arrest of the appellant on 7.4.1990. There is no evidence to show physical condition of the appellant at the time of the arrest – whether there were any marks of injury or not. This becomes relevant in light of the medical evidence that when a person is tried to be throttled, he would resist with physical force and, therefore, in such a case, where the case rests on circumstantial evidence, presence or absence of marks of violence on person of the accused-appellant would assume greater importance. There is medical evidence to show that there could be more than one assailant and in this regard no investigation seems to have been made.

13. There is another angle to the incident. Undisputedly, there was an affair between the appellant and Babuben and the family members of Babuben did not approve of it. The appellant was not even invited to attend the family function of playing to the beats of drum and when he went there, he was manhandled. In

this connection, he lodged a complaint. These aspects are not in dispute. The case of defence is that because of his lodging the complaint, he has been falsely implicated. This defence version deserves due weightage particularly when, in the First Information Report, no suspicion is shown on anyone in spite of the prosecution case regarding appellant having threatened Babuben of committing murder; having been seen last together by Ramesh with the deceased; and having told Narvat to look for the dead body in the field behind the house. The arrest is made after about 15 days and there is no evidence to show as to what led to the arrest.

14. To sum up, it can be said that the evidence on motive part is weak; the evidence as to determination for fulfilment of motive and determination to commit murder therefrom is also not reliable; the prosecution has failed to examine important witnesses; the evidence regarding last seen together is shaky and doubtful; the evidence regarding time of death is also not clear; and last but not the least, the evidence regarding find of dead body, arrest of the appellant and his physical condition, at that point of time, is absent. There is no direct evidence to connect the appellant with the crime

and when the case depending on circumstantial evidence, suffers from the defects as stated above, the conviction recorded by the Trial Court cannot be confirmed. The appeal, therefore, deserves acceptance.

15. In the result, the appeal is allowed. The judgment and order of the Trial Court convicting the appellant for the offence of murder and sentencing him to life imprisonment and also requiring him to pay fine of Rs.500/-, impugned herein, is hereby set aside. The appellant is acquitted of all the charges levelled against him. Since the appellant is on bail, the bail bond shall stand cancelled. Fine, if paid, be refunded to him.

[A. L. DAVE, J.]

[BANKIM N. MEHTA, J.]

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